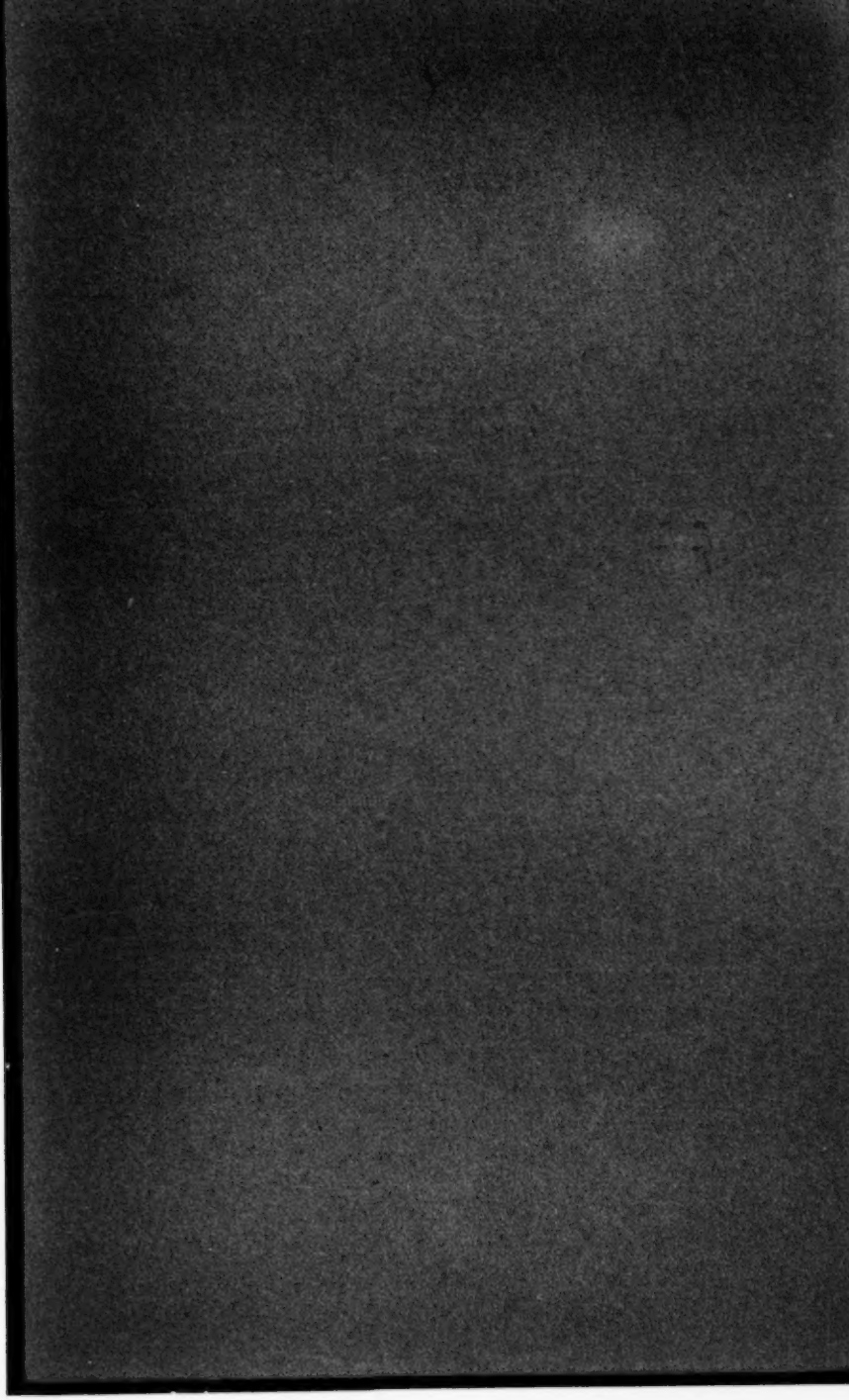

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IN THE

Supreme Court of the United States.

October Term, 1945
No. 815

PROVIDENT TRUST COMPANY OF PHILADELPHIA,

Petitioner,

v.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK,

Respondent.

October Term, 1945
No. 816

PROVIDENT TRUST COMPANY OF PHILADELPHIA, TRUSTEE,

Petitioner,

v.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

JURISDICTION.

The judgments of the Circuit Court of Appeals in both cases were entered December 17, 1945. Petitioner invoked jurisdiction of this Court under Section 240 (a) of the Judicial Code (U. S. Code, Title 28, Paragraph 347).

QUESTIONS PRESENTED.

1. When documents are clear and unambiguous, will the Court determine the rights and duties of the parties as a matter of law, in the absence of fraud, accident or mistake?

(*Affirmed by the Circuit Court.*)

2. Are the rights of the petitioner those of an assignee?

(*Affirmed by the Circuit Court.*)

3. Is the surety on a completion bond liable to the assignee of a defaulting obligee where the principal is free from fault?

(*Negatived by the Circuit Court.*)

STATEMENT.

The two cases were tried together, and the applications for certiorari raise the same questions. Respondent is therefore filing the same brief in both cases. There were three building operations and three sets of documents, alike in form, with three different builders, Martin Furman, Herbert Roehm, and Jesse Storck. The documents and facts in the Furman building operation are used in the Statement and in the Argument.

These suits were filed on March 7, 1930. They were tried by the District Court, without a jury, on December 2, 1943.[1]

The documents upon which the petitioner sues consist of the surety bond and of the assignment on which is the consent to assignment. In addition to these and other documents, the evidence consists of stipulated facts, and the undisputed testimony of one witness.

Paragraphs 16 and 17 of the Stipulation of Facts [2] state the obligee's default and the principal's freedom from fault:

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[1] Reference is made to the Docket Entries for the history of these cases. Appendix, pp. 1a, 70a.

[2] Appendix 54a.

"16. Prior to May 31, 1929, Equitable Bonded Mortgage Company did not advance to Martin Furman, or any other persons, including labor and material men, moneys in the aggregate of $142,000 for the erection and completion of twenty dwellings on the Southeast side of Wadsworth Street between Anderson Street and Ardleigh Street, in the 22nd Ward of the City of Philadelphia, or for the purchase of, and to be secured by, assignments of twenty first mortgages thereon, described in the Operation Agreement, Defendant's Exhibit 17 and in the second recital of Defendant's Bond, Exhibit 'A' of Plaintiff's Statement of Claim, which first mortgages so described were created in the aggregate principal amount of $142,000 and were duly assigned and delivered to Equitable Bonded Mortgage Company; and subsequent to May 31, 1929, Equitable Bonded Mortgage Company advanced no moneys to Martin Furman or any other person or persons for said operation or mortgages."

"17. That Martin Furman, the principal named in Defendant's Bond, Exhibit 'A' of Plaintiff's Statement of Claim, prior to May 31, 1929, had not at any time repudiated his obligation under a certain written agreement, dated October 15, 1928, with the Equitable Bonded Mortgage Company, admitted into evidence as Defendant's Exhibit 17, and referred to in the said bond, Exhibit 'A' of Plaintiff's Statement of Claim, for the erection and completion of the dwellings identified in Paragraph 16 of this Stipulation, or done anything which amounted to a breach of his obligations under the said written agreement, or any act which constituted anticipatory breach of the same. Martin Furman and the labor and material men involved did not abandon the work of construction on the said building operation until after Equitable Bonded Mortgage Company ceased to furnish the funds agreed upon in the Operation Agreement, Defendant's Exhibit 17, and

recited in the Bond, Exhibit 'A' of Plaintiff's Statement of Claim."

The following additional facts relate to the business dealings between petitioner and Equitable.[3]

The business relations between petitioner and Equitable were extensive and pre-dated these transactions by several years.[4] Petitioner had confidence in the financial strength and responsibility of Equitable, and petitioner's Board of Directors authorized its officers to make collateral loans to Equitable up to $500,000 at any one time.[5] During the period from 1926 to 1929, Equitable was one of the larger borrowers from petitioner, perhaps the largest.[6] Petitioner made its loans to Equitable without imposing any restrictions on Equitable as to the use of the proceeds.[7] The petitioner, in previous transactions, had taken from Equitable assignments of surety completion bonds involving other principals and other sureties, which were in the identical form of the bonds and assignments used in the cases at bar.[8] In other transactions with Equitable, petitioner received bonds running directly from the builder and his surety to petitioner as the obligee, indicating that petitioner at times took a direct bond obligation and at other times merely an assigned bond obligation.[9]

In the instant cases, Equitable pledged first mortgages of the Furman operation with petitioner as collateral security for a loan, and assigned the Furman completion bond along with the mortgages. This loan was not made for the purpose of providing Equitable with funds to meet its obli-

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[3] "Equitable" is used throughout to designate "Equitable Bonded Mortgage Company."

[4] Appendix 137a, et seq.

[5] Stipulation of Facts 29, Appendix 59a.

[6] Testimony of Mr. Scattergood, Appendix 144a.

[7] Testimony of Mr. Scattergood, Appendix 155a, et seq., and Stipulation of Facts 28, Appendix 59a.

[8] Testimony of Mr. Scattergood, Appendix 150a, et seq.

[9] Testimony of Mr. Scattergood, Appendix 152a.

gation to any particular builder or building operation.[10] Equitable had full freedom to use the borrowed funds in any manner it desired. The petitioner also knew that Equitable and Equitable Securities Corporation were obligated to the builder for almost double the amount of petitioner's bank loan.[11] Petitioner did not conduct any part of its loan transaction with either the builder or with respondent, and there were no dealings of any kind between petitioner and respondent.[12]

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[10] Testimony of Mr. Scattergood, Appendix 155a.

[11] Testimony of Mr. Scattergood, Appendix 144a; Stipulation 26, Appendix 58a. For instance, the petitioner's loan to Equitable upon the Furman operation mortgages was only $112,000., but the obligations of Equitable to the builder, in the amount of $142,000., and of Equitable Securities Corporation, in the amount of $81,000., totalled $223,000.

[12] Testimony of Mr. Scattergood, Appendix 146a, 154a.

ARGUMENT IN OPPOSITION TO GRANTING OF THE WRIT.

I. The Circuit Court Properly Decided as a Matter of Law That the Petitioner's Rights Against Respondent Were Those of an Assignee.

In urging that the Circuit Court erred in holding petitioner to be an assignee, petitioner assumes that disputed issues of fact appear in the trial record and that the District Court resolved such issues of fact by its findings. Petitioner then argues that the Circuit Court refused to follow what petitioner claims are findings of fact by the District Court, and thereby violated Rule 52 (a) of the Federal Rules of Civil Procedure. Petitioner's assumptions are not correct.

The case was submitted on detailed stipulations of fact, the uncontradicted testimony of one witness, and the documentary evidence. There were no disputed issues of fact in the trial record. The only question for determination was the legal effect of the proven facts. This is a matter of law, not of fact. It is obvious that the Circuit Court is not precluded from determining a question of law merely because the District Court may have termed a legal conclusion a finding of fact.[13]

A. Interpretation of Unambiguous Documents is a Matter of Law.

Under the law of Pennsylvania the interpretation of an unambiguous contract is for the Court, not for the Jury. The following are clear judicial holdings to that effect:

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[13] Petitioner appears to argue to the contrary. "However, the Circuit Court of Appeals was not at liberty to nullify the effect of the trial court's finding by considering it in any light other than as a finding of fact." (*Petitioner's Brief, p. 16.*)

"Where all of the agreement or understanding between the parties is before the court in writing and it is unnecessary for any reason to resort to any evidence dehors the written contract, the court must construe the contract and not leave it to the jury for interpretation. . . . The construction of a written contract of employment is a matter of law."

Baldwin v. Magen, 279 Pa. 302, at 306, 123 Atl. 815 (1924).

"His [the plaintiff's] contention that this [the letter] was ambiguous is, in our opinion, wholly untenable. We cannot find in the letter any difficulty of construction which justified the trial judge in permitting plaintiff to testify as to his interpretation and in submitting to the jury the question of the reasonableness of such interpretation. We think that its language was plain, and that, therefore, as in the case of all written instruments, it was the function of the court to declare and apply its meaning."

Currie v. Land Title Bank and Trust Co., 333 Pa. 310, at 314, 5 A. (2d) 168 (1939).[14]

In the cases at bar, the language of the bond, of the assignment, and of the consent to the assignment, was clear and unambiguous, and not in dispute. Therefore, the interpretation of those instruments was for the Court in accordance with the above rule. Had there been a jury trial in the cases at bar, and had the trial judge submitted those instruments to the jury for interpretation, this would have been reversible error.

The questions in the instant cases are for the Court, and therefore the cases cited by the petitioner for the proposition that findings of fact shall not be set aside unless

[14]Accord: *Shafer v. Senseman,* 125 Pa. 310, 316, 17 Atl. 350 (1889); *Kelley v. Delaware, Lackawanna & Western Railroad Co.,* 270 Pa. 426, 428, 113 Atl. 419 (1921).

clearly erroneous are not applicable here.[15] For the same reason, Rule 52 (a) does not apply. As was stated by the Circuit Court of Appeals for the Fifth Circuit:

> "A copy of one of the certificates, the resolution authorizing their issuance and what has been done, since their issuance, with and in regard to them, appears in the evidence without contradiction or dispute. The case then is not one for the weighing of evidence, and the resolution of testimonial differences, and in which therefore, we must take the facts as the District Judge has found them, but one for the determination by us of the legal effect of the facts as the record

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[15]All the cases cited by petitioner involve findings of fact. In *McCaughn v. Real Estate Land Title & Trust Co.*, 297 U. S. 606, and in *Allen v. Trust Company of Georgia et al.*, 90 L. Ed. 305 (1946), the issue of fact was whether a gift had been made in contemplation of death. *Tennessee Coal Company v. Muscoda Local*, 321 U. S. 590, and *National Mutual Casualty Co. v. Eisenhower*, 116 F. (2d) 891 (C. C. A. 10, 1940) both involved factual determinations based upon extended, detailed and partially conflicting testimony. *Commissioner of Internal Revenue v. Scottish American Investment Company, Ltd.*, 323 U. S. 119, and *Boehm v. Commissioner*, 90 L. Ed. 96, came up from the tax court and the special provisions of the Internal Revenue Code and the rule of *Dobson v. Commissioner*, 320 U. S. 489 (1943), not Rule 52a, prevail. None of these cases involves the question of construction of written instruments which, as in the cases at bar, under Pennsylvania law is a matter of law for the court and not a matter of fact for a jury. *Biggs v. Mays*, 125 F. (2d) 693 (C. C. A. 8, 1942), was determined with special reference to Arkansas—not Pennsylvania—law. *Bogk v. Gassert*, 149 U. S. 17 (1893) and the Pennsylvania cases cited by Petitioner at page 17 are cases where, to prevent imposition and fraud, the Court inquired into the underlying agreement between the parties. See Opinion of the Circuit Court, Petitioner's Brief p. 20a and footnote 13 thereto.

presents them, clearly, simply and without controversy."

U. S. v. South Georgia Ry. Co., 107 F. (2d) 3 (C. C. A. 5, 1939).[16]

The Circuit Court for the Seventh Circuit stated the rule thus:

"Since the facts are not in dispute, we are free to consider them and to reach our own conclusion, untrammeled by the District Court's findings and conclusions of law. Especially is this rule applicable in the case at bar, where all the facts are stipulated."

Wigginton v. Order of United Commercial Travelers of America, 126 F. (2d) 659, 661 (C. C. A. 7, 1942); certiorari denied, 317 U. S. 636, 63 S. Ct. 28 (1942).

B. The Circuit Court correctly interpreted the documents.

It remains to consider whether the Circuit Court was correct in concluding that petitioner was only an assignee of Equitable and therefore subject to the defenses against Equitable.

Following the sound suggestion of the Circuit Court not to "put the cart before the horse,"[17] the writings themselves should be examined first. In the bond[18] Equitable and Equitable Securities Corporation are named as

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[16]Accord: *United States v. Mitchell*, 104 F. (2d) 343 (C. C. A. 8, 1939), "In this case no occasion arises for the application of the tests contemplated by either of said Rules to the findings of fact by the Trial Court. There is no conflict in the evidence. The evidence in relation to the claimed contract is all documentary." To the same effect, see *Kuhn v. Princess Lida of Thurn & Taxis*, 119 F. (2d) 704 (C. C. A. 3, 1941).

[17] Opinion of the Circuit Court, Petitioner's Brief, p. 19a.

[18]Appendix 15a.

obligees, Martin Furman, the builder, as principal, and respondent as surety. There is nothing ambiguous or uncertain in the naming of the parties and petitioner is nowhere mentioned. The language of the assignment [19] is that Equitable "does hereby grant, bargain, sell, transfer, assign and set over unto petitioner all of its right, title and interest in and to and right to recover under a certain bond." [20] It speaks of the bond "so assigned" and of "this assignment", and provides that under certain circumstances the petitioner would "re-assign" the bond to Equitable. This language is certainly unambiguous and does not purport in any way to vary the clear language of the bond. Finally, there was principal's and respondent's consent to the assignment which reads, "We hereby consent to the above assignment." [21]

The writings have been pleaded as and stipulated to be a bond, an assignment of the bond, and a consent to the assignment of the bond. There is no language in any of the instruments which suggests that they are anything else. Neither the petitioner nor the District Court has pointed to any language which supports the conclusion that petitioner, and not Equitable, was intended to be the obligee of the bond.[22] The Circuit Court concluded that the language was "clear, exact, accurate." [23] Nothing could be more obvious.

When instruments are as clear and unambiguous as these, their meaning must be determined from the instru-

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[19] Appendix 17a.

[20] Ibid.

[21] Appendix 18a.

[22] Although in the Questions Involved and in various portions of its Brief petitioner refers to Equitable as a "promoter" and as the "nominal" obligee it should be noted that such designations are wholly incompatible with the status of Equitable as disclosed by the pleadings and stipulations.

[23] Opinion of the Circuit Court, Petitioner's Brief, p. 20a.

ments themselves and, in the absence of alleged fraud, accident or mistake, courts will not go beyond the four corners of the instrument to determine the intent of the parties. The following statement from Corpus Juris [24] has been quoted with approval in Pennsylvania [25] and correctly states the law of Pennsylvania on the interpretation of written instruments:

> "The intention of the parties is to be deduced from the language employed by them, and the terms of the contract, where unambiguous, are conclusive, in the absence of averment and proof of mistake, the question being, not what intention existed in the minds of the parties, but what intention is expressed by the language used. When a written contract is clear and unequivocal, its meaning must be determined by its contents alone; and a meaning cannot be given it other than that expressed."

The Supreme Court of Pennsylvania has stated:

> "The object of interpretation and construction is, if there be any uncertainty as to the meaning of a contract, to find the intention of the parties. *If the contract is clear and unambiguous there is no room for construction. The parties, in the absence of fraud, accident or mistake, are bound according to the plain words of the contract.*" (Italics supplied.)
>
> *Shafer v. Senseman,* 125 Pa. 310, at 316, 17 Atl. 350 (1889).

The interpretation of surety bonds is no exception:

> "In other words, the liability of the sureties must be determined by the contract of the parties *as disclosed by the language of the bond.*

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[24] 13 C. J. pp. 524-525.

[25] *Nat. Realty Appraisal Co. v. Art Club,* 129 Pa. Super. 99, 195 Atl. 139 (1937).

"A bond, like any other contract, must be construed as to carry out the intention of the parties accepting and giving it. In the absence of fraud, accident or mistake, if the intention clearly appears from its terms its interpretation cannot be controlled by testimony dehors the instrument itself." (Italics supplied.)

Phoenix Mill Co. v. Kresge, 254 Pa. 36, at 41, 98 Atl. 772 (1916).

There has never been any claim of fraud, accident or mistake in the present case. There is no ambiguity in the bond, assignment, or consent to assignment as to who were the parties to the instrument and what were to be their rights and obligations. That being the case, the District Court was bound to follow the clear intention expressed by the language of those writings. That Court ignored the facts that Equitable and Equitable Securities Corporation are the obligees in the bond, that Equitable *assigned* its interest in the bond to petitioner, and that respondent consented to the *assignment,* and held that petitioner was the obligee of the bond. Under the Pennsylvania authorities a court may not ignore the clear unambiguous language of a writing. In doing so the District Court was clearly in error and the Circuit Court properly corrected this error.

After examining the language of the instruments and concluding that the petitioner was only an assignee, the Circuit Court considered the facts urged by petitioner in support of its direct obligee claim. In so doing,[26] the Circuit Court was merely showing that the facts were consistent with and supported, the legal conclusion. The Court was clearly within the province of appellate review.[27]

The following are the facts. The principal on this bond entered into a contract with Equitable by which he

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[26] Petitioner's Brief, p. 16.

[27] *Shafer v. Senseman,* 125 Pa. 310, 17 Atl. 350 (1889).

agreed to construct buildings on certain real estate and to assign to Equitable first mortgages on the real estate; Equitable on its part agreed to purchase these mortgages and to advance the purchase price as the work progressed in order to provide funds for the building operations. Before the delivery of the bond to the obligees, the principal and respondent executed the consent to assignment. The bond, the assignment and the consent to assignment were delivered under one backer to Equitable and Equitable Securities Corporation. Later the same day Equitable delivered them to petitioner along with the mortgages pledged by Equitable for a loan, the proceeds of which Equitable was free to use for any purposes Equitable saw fit.

Certainly there is nothing in these facts which is inconsistent with the plain language of the instruments. The language of the instruments is the primary source for determining the meaning. The surrounding facts, when consistent with that meaning, cannot be used as a basis for overthrowing it.

The petitioner has listed five facts which it contends support the so-called "finding" of the District Court.[28] The first is that respondent knew that petitioner was to be the ultimate recipient of the bond. The record discloses that respondent knew the bond was going to be *assigned* to petitioner. However, there is not one scintilla of evidence that petitioner expected to receive the bond in any other capacity than as an assignee.[29]

The second is that the assignment and consent to assignment were executed prior to delivery of the bond to the obligees. The signing of a simple consent to assignment prior to delivery of the bond is clearly without any legal significance to change the meaning of the language

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[28] Petitioner's Brief, p. 12.

[29] In some instances petitioner deliberately accepted *direct* obligations, and in others it accepted *assigned* obligations in precisely the same form as in the cases at bar. Appendix 150a et seq.

of the writings.[30] The bond and assignment, with the consent to assignment, were delivered by the respondent to Equitable,—not to the petitioner—and it was not until Equitable thereafter delivered them to the petitioner that the petitioner acquired rights under them.

The third fact is that the bond, assignment and consent to assignment were under one backer. What more natural and convenient way is there to keep together an assignment and the instrument assigned?

The fourth fact is that Equitable delivered the instruments to the petitioner the same day it received them. No act of Equitable with its assignee could be determinative of the rights and duties of the respondent under the bond.

The fifth fact is that the petitioner required the completion bond as collateral before it would loan its money to Equitable. The answer to this is that it received what it asked for. The bond assigned was sound protection against any default by the builder-principal. The effect of the District Court's holding that the petitioner was a direct obligee of the bond was to distort an ordinary surety completion bond into a bond which also insures an assignee against a default of its assignor-obligee, a result not justified by the plain language of the instrument.[31]

None of these five facts nor any other facts surrounding the execution and delivery of the bond, assignment and consent to assignment suggest that the parties intended those instruments to mean something contrary to their unambiguous terms. The District Court's conclusion that petitioner and not Equitable was the obligee of the bond was an erroneous conclusion of law; first, because it ignored the plain meaning of the language of those instruments contrary to the applicable rules of construction, and second, because the undisputed facts relied upon do not support

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[30] *Northwestern National Bank v. Commonwealth*, 345 Pa. 192, 27 A. (2d) 278 (1942). See Opinion of Circuit Court, Footnote 10. Petitioner's Brief, p. 19a.

[31] Appendix 15a et seq.

that conclusion. Even if the District Court's conclusion had been a finding of fact, it is clear from the foregoing discussion that such a finding would have been clearly erroneous under the judicial decisions applying Rule 52 (a). The Circuit Court of Appeals was therefore correct in reversing that conclusion and was clearly within the scope of appellate review in so doing.

The Circuit Court held that the petitioner was an assignee and applied the law of Pennsylvania that the rights of an assignee rise no higher than those of its assignor. Equitable, the assignor, having defaulted its obligation to the builder, thereby excused the builder from his obligation to perform the underlying contract and under the bond in suit. The assignor having no rights, the assignee has none.

II. The Circuit Court Properly Applied the Law of Pennsylvania in Holding That in the Absence of Default by a Principal Neither He Nor His Surety Are Liable on the Bond.

Petitioner, an assignee, seeks a construction of this bond the effect of which would be to permit an obligee to commit a breach of its contract with the builder so as to prevent the builder's completion of that contract,[32] and *despite that breach,* still recover from the surety and necessarily from the builder on the completion bond because the buildings were not built. To permit the Court to reach this conclusion petitioner argues that the bond obligation must be determined from the condition alone. This startling doctrine is not the law of Pennsylvania.

The rule of construction correctly applied by the Circuit Court in the cases at bar was the general rule that a

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[32] That the default by Equitable was the operative cause of non-completion of the houses by the principal is conceded. See Opinion of District Court, Petitioner's Brief, p. 3a.

bond must be interpreted in the light of the entire instrument, *inclusive of its recitals,* rather than from the condition alone.[33] This is the law of Pennsylvania. There are no exceptions.[34] The cases cited by petitioner are examples of, not exceptions to, that rule.

In *Young v. American Bonding Company,*[35] the plaintiff argued that the Court could not refer to the underlying contract in determining the obligation of the bond. The Court rejected that argument and held that the bond, the recitals of which are strikingly similar to those in the cases at bar, recited quite enough to "show that the engagement under the bond . . . was entered into on the common understanding that the mutual obligations of the parties thereunder would be faithfully observed." Contrary to the argument of petitioner[36] the Court gave no consideration whatever to the fact that the contract was referred to in the *condition.*

In *Phoenix Mill Company v. Kresge,*[37] the bond recited a sales agency contract covering the New York State area and was conditioned on the forwarding by the agent, within forty-five days, of all money due to the employer. The action was brought for money received by the agent from sales in Pennsylvania. The Court again refused to follow the contention that the obligation should be determined from the condition without regard to the recitals and held that, as the recitals referred to a New York sales agency, the bond obligation was limited to sales in that territory even though no such limitation was stated in the condition. The Court emphasized that to construe the bond otherwise was to make the recitals surplusage and meaningless.

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[33] *Phoenix Mill Company v. Kresge,* 254 Pa. 36, 98 Atl. 772 (1916); *Young v. American Bonding Company,* 228 Pa. 373, 77 Atl. 623 (1910).

[34] Petitioner's Brief, p. 21.

[35] Note 33, *supra.*

[36] Petitioner's Brief, p. 22.

[37] Note 33, *supra.*

That reasoning is equally applicable here. The second recital [38] expressly sets forth that Equitable was to advance moneys. Petitioner's contention that the obligation of the bond must be determined from the condition alone makes surplusage of this recital, which refers to a matter of vital concern to the surety's risk.

The *Phoenix* case, supra, was cited approvingly *and applied in favor of* a compensated corporate surety in *New Holland Dairies, Inc. v. Regent Dairy Products Corp.*,[39] where also the underlying contract of the parties was referred to in the *recitals*.

The above cases show the incorrectness of petitioner's assertion [40] that "In Pennsylvania the Courts look to the recitals of a bond to explain the condition thereof only in certain types of cases."

The cases cited by petitioner do not support that assertion. In *United States v. Morrisdale Coal Co.*,[41] the District Court did not even suggest that the condition was so indefinite as to be unenforceable. It conceded that the obligee's construction was tenable if the condition was to be read "literally and in vacuo" but held that a bond must be interpreted in the light of the recitals. In *Nazareth F & M Co. v. Marshall Co.*,[42] the problem considered by the court was whether the obligation should be construed in the light of the *entire* underlying contract referred to in the recitals, or only in the light of the *parts* thereof which had been set out in detail. Because parts had been set out in detail in the recitals, the court held that the bond obliga-

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[38] "Whereas, the Equitable Bonded Mortgage Company has agreed to advance One Hundred Forty-two Thousand Dollars ($142,000.) for the purchase of, and to be secured by assignments of first mortgages on the above mentioned dwellings, . . ." Appendix p. 16a.

[39] 115 Pa. Super. 87, 174 Atl. 664 (1934).

[40] Petitioner's Brief, p. 21.

[41] 50 F. Supp. 138 (D. C., E. D. Pa., 1942).

[42] 258 Pa. 558, 102 Atl. 268 (1917).

tion should be limited by those provisions and not the entire underlying contract.[43]

Petitioner further contends that *Dunbar v. Fleisher*[44] and the *Young* case, supra, were so decided *because* reference to the underlying obligation of the parties appeared in the condition of the bond. In neither opinion did the Court place any emphasis on whether the reference to the underlying obligation was in the condition or in the recitals. The decisions of the Pennsylvania appellate courts in the *Phoenix Mill*, the *New Holland Dairies*, and the *Nazareth* cases, all *supra*, and of the District Court in the *Morrisdale Coal Co.* case, *supra*—all cases where the reference to the underlying obligations appear in the recitals and not in the condition—disprove the existence of the rule asserted by petitioner.

Purdy v. Massey[45] is incorrectly stated by Petitioner as to both facts and law.

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[43] It is significant that the court indicated that had it not been for the details in the recitals it might have enforced the bond in the light of *all* the provisions of the contract referred to in the bond. 258 Pa at 564, 102 Atl. at 270.

[44] 137 Pa. 85, 20 Atl. 520 (1890).

[45] 306 Pa. 288, 159 Atl. 545 (1932). In that case, Massey, through an agent, entered into an agreement to purchase Mrs. Purdy's land for $85,000, of which $25,000 was to be paid in cash and the balance by a $60,000 purchase money first mortgage. The agreement further provided that if the purchaser determined to build a garage on the land in accordance with certain plans, Mrs. Purdy, upon being given a completion bond, would subordinate the $60,000 mortgage to the lien of a construction mortgage or mortgages in favor of others, in an amount not exceeding $80,000. Massey then executed a construction contract, in which it was provided that the construction mortgage funds would be retained by a mortgage agency and disbursed as work progressed. Mrs. Purdy accepted the $60,000 *second* mortgage, in lieu of her agreed first mortgage, upon the receipt of the completion bond in suit, which recited not only the building agreement but also the agreement of Mrs. Purdy to take the $60,000 second mortgage. The *use* of the

Petitioner's presentation of this case gives the impression that failure of consideration was a principal defense and that the case turned on that defense. Nothing could be less accurate.[46] The principal defense was impossibility of performance because of the injunction. This defense was rejected because the injunction was against the contemplated use, and not against construction. That this was the only defense considered by the Court is evident from its own statement:[47]

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proposed building as a public garage was enjoined as being in violation of zoning restrictions and Massey abandoned construction. The first mortgagee, having advanced the construction mortgage loan of $80,000, foreclosed, wiping out Mrs. Purdy's second mortgage, and she then instituted suit against Massey and his surety on the bond. The trial court's refusal to charge "there was no default on the part of the builder since the builder had never received the money payments required by the contract" (see Petitioner's Brief, p. 24) was fully justified by the "original record" to which Petitioner has referred.

[46] Petitioner makes the further error of assuming that it stands in the position of Mrs. Purdy as the direct obligee and that the principals stand in the position of Mr. Massey. This is not so. *Equitable* stands in the position of Mrs. Purdy, and the principals, the builders, stand in the position of Massey, with these very vital differences:

(1) Mrs. Purdy, the obligee, performed her part of the underlying agreement with Massey to take the second mortgage *which is referred to in the recital of the bond;* whereas, in the cases at bar, it is *stipulated* neither of the obligees performed their undertakings with the principals. (Stipulations 16 and 18, Appendix pp. 54a, 55a.)

(2) Massey, the builder, defaulted after Mrs. Purdy had performed, whereas in the cases at bar it is *stipulated* that the builders had not repudiated their obligation to build or abandoned construction or done anything in the nature of an anticipatory breach. (Stipulation 17, Appendix p. 54a.)

[47] 306 Pa. at 295, 159 Atl. at 547.

"Defendants contend that the injunction issued against (the builders) was a sufficient legal excuse and justification for their failure to erect the building. It is their only excuse, and it is neither legal nor sufficient."

The principal question with which both the Court and counsel were concerned was the measure of damages which depended upon whether the bond was one of guarantee or indemnity. The use by the Court of the term "absolute" relates only to the difference between a condition expressing indemnity and a condition expressing guaranty. The term bears no relationship to defenses against enforceability arising from the failure of an obligee to comply with its basic covenants as in the cases at bar. The Supreme Court of Pennsylvania held the surety as a guarantor of the performance by the principal, and nothing more. The analysis of this case by the Circuit Court, in the instant cases,[48] is incontrovertibly correct.

The Circuit Court here construed the bonds in the light of the recitals as is required by the decisions in Pennsylvania, and concluded that respondent's obligation was conditioned on a default by the principal on the underlying contract. Since it is expressly stipulated in the cases at bar that the principal was *not* in default, it held that respondent was not liable. The Circuit Court has reaffirmed the basic principles of law that the obligations of a surety are no greater than those of its principal,[49] and if the principal is not in default or if the obligee has failed to perform its obligations to the principal,[50] neither the obligee nor his assignee may claim against the principal or the surety on his bond. This is, and always has been, the

[48] Opinion of the Circuit Court, Petitioner's Brief, p. 21a.

[49] *McShain v. Indemnity Insurance Company of North America*, 338 Pa. 113, 12 A. (2d) 59 (1940).

[50] Restatement, Security (1941) § 126; Williston, Contracts (1936) § 1243; Restatement, Contracts (1932) §§ 274 (1), 279.

law of Pennsylvania. The Circuit Court did not err in either its interpretation or application of this law.

III. The Circuit Court Did Not Violate the Rule That Contracts of Paid Sureties Are to Be Construed Strictly Against Them.

The general rule stated by petitioner stands unchallegend, but it is inapplicable here. That rule is a secondary rule of construction which operates only when an uncertainty exists after consideration of the language of the instrument. No uncertainties exist in this case. The rule does not authorize a distortion of the language of an unambiguous instrument for the purpose of imposing liability on a paid surety where none otherwise exists.

> "The fact that the defendant was a paid surety and that the contract is, therefore, to be construed most strictly against it does not warrant a construction of words contrary to their clear intent."
>
> *New Holland Dairies, Inc. v. Regent Dairy Products Corp.*, 115 Pa. Super. 87, at 91, 174 Atl. 664 (1934).
>
> Accord: *Commonwealth v. Cohen*, 140 Pa. Super. 361, 14 A. (2d) 362 (1940).
>
> *In Re Podolsky*, 115 F. (2d) 965, (C. C. A. 3, 1940).

It is worth noting that the documents here sued upon are identical in form and operative language with other bonds and assignments accepted and received by petitioner from Equitable in many prior transactions relating to other principals and other sureties.[51] Respondent, not petitioner, was the newcomer to these transactions. That petitioner was well aware of the nature of the obligations here accepted by it is evident from its deliberate acceptance in other cases of bonds which ran directly in its favor as

[51] Testimony of Mr. Scattergood, Appendix 137a, 139a, 150a.

obligee and which made no reference in the recitals to the underlying contract between the builders and Equitable.[52]

IV. The Circuit Court of Appeals Did Not Apply Inconsistent Standards of Construction in Reaching Its Decision.

Petitioner urges that the Circuit Court applied "a rule of strict construction to the benefit of the paid surety" in concluding that petitioner's rights under the bond were those of an assignee. The Circuit Court examined the plain and unambiguous meaning of the language of the instruments, considered the undisputed facts, and followed that plain and unambiguous meaning. This is neither a strict nor a liberal interpretation. It is the *only* interpretation which can be reached without completely and unjustifiably distorting the language of those instruments.

Petitioner urges further that the Circuit Court adopted "a liberal and strained construction"[53] in concluding that the condition of the bond excused the obligors when the obligee had breached his contract and caused the failure complained of. In so doing it adopted the only reasonable construction possible and the construction it was required to adopt under the Pennsylvania decisions.

* * *

It is respectfully submitted that no one of the reasons advanced by the petitioner in support of its Petition is sound and that there is no occasion for review by this Court of the decision of the Circuit Court of Appeals.

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March 1, 1946.

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[52] Testimony of Mr. Scattergood, Appendix 152a, 154a; Defendant's Exhibits 21 and 22; Appendix 250a, 253a.

[53] Petitioner's Brief, p. 32.